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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 BYRON L. SCOTT,
12 CDCR #K-14735,

13 Plaintiff,

14
15 vs.

16 CALIFORNIA DEP'T OF
17 CORRECTIONS AND
18 REHABILITATION; EMPLOYEES OF
19 CALIPATRIA STATE PRISON,

20 Defendants.
21

Civil No. 10cv0917 IEG (CAB)

ORDER:

**(1) DENYING EX PARTE MOTION
FOR RECONSIDERATION;**

and

**(2) DENYING MOTION TO
PROCEED *IN FORMA PAUPERIS* AS
BARRED BY 28 U.S.C. § 1915(g)**

[Doc. Nos. 3, 5]

22 Currently before the Court is Plaintiff's "Ex Parte Motion for Special Action In
23 Personam" [Doc. No. 5] in which he seeks reconsideration of the Court's May 4, 2010 Order.
24 In addition, Plaintiff has filed a "Motion to Proceed *In Forma Pauperis*" ("IFP") [Doc. No. 3].

25 **I. Procedural Background**

26 On April 26, 2010, Plaintiff filed a "Complaint and Affidavit for Investigation and
27 Prosecution" which he claimed was filed on behalf of himself and seventeen other inmates at
28 Calipatria State Prison ("CAL"). Because Plaintiffs claimed the California Department of

1 Corrections and Rehabilitation and unidentified prison officials at CAL violated their rights
 2 under various provisions of the U.S. Constitution and California law since a racial riot occurred
 3 on CAL's Facility C on March 20, 2010 (Compl. at 1-3), the Court liberally construed the action
 4 to arise under the Civil Rights Act, 42 U.S.C. § 1983. *See* May 4, 2010 Order at 1.

5 This action was dismissed because Plaintiff Scott failed to file a Motion to Proceed IFP.
 6 *Id.* at 2-3. In addition, the Court noted that, as a prisoner proceeding pro se, Plaintiff Scott had
 7 no authority to represent the legal interests of anyone other than himself. *Id.* at 2. Thus, the
 8 remaining Plaintiffs were terminated from the Court's docket. *Id.* at 3.

9 Plaintiff then filed a Motion to Proceed IFP, along with an "Ex Parte Motion for Special
 10 Action in Personam on Reconsideration of Subject-Matter Jurisdiction and On Requirements in
 11 Filing Fees or Proceeding IFP."

12 **II. Plaintiff's Motion for Reconsideration**

13 Plaintiff seeks reconsideration of the Court's May 4, 2010 Order on the grounds that the
 14 Court wrongfully construed his Complaint as a civil complaint and that the Court should not
 15 have dismissed his action for failing to pay the initial civil filing fee. Specifically, Plaintiff seeks
 16 to bring an action pursuant to 18 U.S.C. § 4 because prison officials at CAL "knowingly,
 17 willfully and continually act and conspire to oppress, injure, and damage BLACK prisoners
 18 under operations in which patterns and/or practices of flagrant and/or egregious conditions
 19 depriving BLACK prisoners of their constitutional right to Life, Liberty, and/or Property ." *See*
 20 Pl.'s Mot. to Reconsider at 3.

21 The Federal criminal statute dealing with misprision of felony provides:

22 "[w]hoever, having knowledge of the actual commission of a felony cognizable
 23 by a court of the United States, conceals and does not as soon as possible make
 24 known the same to some judge or other person in civil or military authority under
 the United States, shall be fined under this title or imprisoned not more than three
 years, or both."

25 18 U.S.C. § 4

26 Plaintiff argues that he is bringing this action to report the alleged criminal behavior of
 27 CAL prison officials. However, a violation of this criminal statute does not provide for a private
 28 right of action by plaintiff simply because he claims he has been affected by its alleged violation.

1 There is no private cause of action for the alleged violation of 18 U.S.C. § 4 unless the intent to
 2 create a private cause of action is expressed in the statute or clearly implied. *See Central Bank*
 3 *of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994); *Cort v. Ash*,
 4 422 U.S. 66, 79 (1975). Here, neither the statute itself nor any legal authority provides for a
 5 private cause of action under 18 U.S.C. § 4. Thus, Plaintiff's Motion for Reconsideration is
 6 **DENIED.**

7 **III. Motion to Proceed IFP**

8 Even if Plaintiff were to attempt to proceed in this matter as one brought pursuant to 42
 9 U.S.C. § 1983, he cannot proceed IFP for the reasons set forth below.

10 Section 1915 of Title 28 of the United States Code allows certain litigants to pursue civil
 11 litigation IFP, that is, without the full prepayment of fees or costs. 28 U.S.C. § 1915(a)(2).
 12 However, the Prison Litigation Reform Act ("PLRA") amended section 1915 to preclude the
 13 privilege to proceed IFP:

14 . . . if the prisoner has, on 3 or more prior occasions, while
 15 incarcerated or detained in any facility, brought an action or appeal
 16 in a court of the United States that was dismissed on the grounds
 17 that it is frivolous, malicious, or fails to state a claim upon which
 relief can be granted, unless the prisoner is under imminent danger
 of serious physical injury.

18 28 U.S.C. § 1915(g). "This subdivision is commonly known as the 'three strikes' provision."
 19 *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (hereafter "*Andrews*"). "Pursuant to
 20 § 1915(g), a prisoner with three strikes or more cannot proceed IFP." *Id.*; *see also Andrews v.*
 21 *Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter "*Cervantes*") (under the PLRA,
 22 "[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from IFP
 23 status under the three strikes rule[.]"). The objective of the PLRA is to further "the
 24 congressional goal of reducing frivolous prisoner litigation in federal court." *Tierney v. Kupers*,
 25 128 F.3d 1310, 1312 (9th Cir. 1997).

26 "Strikes are prior cases or appeals, brought while the plaintiff was a prisoner, which were
 27 dismissed on the ground that they were frivolous, malicious, or failed to state a claim,"
 28 *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), "even if the district court styles

1 such dismissal as a denial of the prisoner's application to file the action without prepayment of
 2 the full filing fee." *O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008). Once a prisoner has
 3 accumulated three strikes, he is prohibited by section 1915(g) from pursuing any other IFP
 4 action in federal court unless he can show he is facing "imminent danger of serious physical
 5 injury." *See* 28 U.S.C. § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)'s exception
 6 for IFP complaints which "make[] a plausible allegation that the prisoner faced 'imminent
 7 danger of serious physical injury' at the time of filing.").

8 As an initial matter, the Court has carefully reviewed Plaintiff's Complaint and has
 9 ascertained that there is no "plausible allegation" to suggest Plaintiff "faced 'imminent danger
 10 of serious physical injury' at the time of filing." *Cervantes*, 493 F.3d at 1055 (quoting 28
 11 U.S.C. § 1915(g)).

12 A court "'may take notice of proceedings in other courts, both within and without the
 13 federal judicial system, if those proceedings have a direct relation to matters at issue.'" *Bias*
 14 *v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d
 15 801, 803 n.2 (9th Cir. 2002)); *see also United States ex rel. Robinson Rancheria Citizens*
 16 *Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Thus, this Court takes judicial
 17 notice that Plaintiff has had three prisoner civil actions dismissed on the grounds that they were
 18 frivolous, malicious, or failed to state a claim upon which relief may be granted.

19 They are:

- 20 1) *Scott v. Schwarzenegger*, Civil Case No. 07-1064 UA (Duty) (C.D. Cal. Oct. 30,
 21 2007) (Order of Dismissal for failing to state a claim and as legally and/or
 22 factually patently frivolous) (strike one);
- 23 2) *Scott v. High Desert State Prison*, Civil Case No. 07-0769 FCD DAD (E.D. Cal.
 24 Feb. 6, 2008) (Order of Dismissing for failing to state a claim and as frivolous)
 25 (strike two);
- 26 3) *Scott v. M. Trimble, et al.*, Civil Case No. 09-0855 DMS (WMc) (S.D. Cal. June
 27 3, 2009) (Order dismissing Complaint for failing to state a claim pursuant to 28
 28 U.S.C. §§ 1915(e)(2) & 1915A(b) (strike three).

Accordingly, because Plaintiff has, while incarcerated, accumulated three “strikes” pursuant to § 1915(g), and he fails to make a “plausible allegation” that he faced imminent danger of serious physical injury at the time he filed his Complaint, he is not entitled to the privilege of proceeding IFP in this action. *See Cervantes*, 493 F.3d at 1055; *Rodriguez*, 169 F.3d at 1180 (finding that 28 U.S.C. § 1915(g) “does not prevent all prisoners from accessing the courts; it only precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status”); *see also Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“[C]ourt permission to proceed IFP is itself a matter of privilege and not right.”).

IV. Conclusion and Order


For the reasons set forth above, the Court hereby:

- 1) **DENIES** Plaintiff’s “Ex Parte Motion for Special Action in Personam on Reconsideration of Subject Matter Jurisdiction” [Doc. No. 5];
- 2) **DENIES** Plaintiff’s Motion to Proceed IFP [Doc. No. 3] pursuant to 28 U.S.C. § 1915(g);
- 3) **CERTIFIES** that an IFP appeal from this Order would be frivolous and therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if appeal would not be frivolous).

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: June 13, 2010


IRMA E. GONZALEZ, Chief Judge
 United States District Court